

Quantity Purchase Agreement With The State Of Indiana

Vendor CAPE CLEAR SOFTWARE INC
Remit to: 880 WINTER STREET SUITE 300
WALTHAM MA 02451

Name and Address of Vendor: CAPE CLEAR SOFTWARE INC
Cntct: CHRIS MASCIA
880 WINTER STREET SUITE 300
WALTHAM MA 02451

Qty Purchase Agreement QPA Number	Page
0000000000000000000010094	1 of 2
Requisition Nbr.:	D20-8-1342
Effective Date:	11/17/2006
Expiration Date:	11/16/2008
Agency Number:	
Facility:	IOT
Vendor Federal ID:	943393401
Vendor Telephone Nbr:	781/718-9949--
Name Of Contact Pers:	CHRIS MASCIA
FAX Number:	781/622-2378--

In accordance with your bid, submitted in response to the above referenced solicitation, the Vendor agrees that the Indiana Department of Administration, Procurement Division, has the option to purchase the items listed below under the terms of this agreement.

The Vendor agrees to charge these prices for any products ordered on any QPA release received after the expiration of the QPA but issued prior to the expiration date. The quantity listed herein is an estimate of the requirements. The state may order substantially more or substantially less pursuant to the terms of this agreement.

Orders are to be delivered only upon receipt of properly approved Quantity Purchase Award Release.

Line Number	Quantity	UNIT	Article and Description	Unit Price
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This is an award of a Quantity Purchase Agreement for Cape Clear Enterprise Service Bus Server and Developer Licenses, Maintenance/Support, and Consulting Services for installation, architecture/infrastructure development, and agency implementations.

This contract is managed by IOT. To use this QPA, please contact:

Bill Pierce
IOT Director of Procurement
(317) 233-2009
bpierce@iot.in.gov

QPA can be mutually renewed for two additional years.

The vendor agrees to charge these prices for any products ordered on any QPA release received after the expiration date, but issued prior to the expiration date, and postmarked no later than 14 business days after the QPA's expiration date.

Quantities are estimates and could be more or less.

1	99,999,999.00	EA	000000000100027319	CAPE CLEAR ESB SERVER ENVIRONMENT 1-10 LICENSES	28,000.0000
2	99,999,999.00	EA	000000000100027320	CAPE CLEAR ESB SERVER ENVIRONMENT 11-25 LICENSES	25,200.0000
3	99,999,999.00	EA	000000000100027321	CAPE CLEAR ESB SERVER ENVIRONMENT 26-50 LICENSES	22,400.0000
4	99,999,999.00	EA	000000000100027322	CAPE CLEAR ESB SERVER ENVIRONMENT 51-100 LICENSES	19,600.0000
5	99,999,999.00	EA	000000000100027323	CAPE CLEAR ESB SERVER ENVIRONMENT 101-200 LICENSES	16,800.0000
6	99,999,999.00	EA	000000000100027324	CAPE CLEAR ESB SERVER ENVIRONMENT > 200 LICENSES	14,000.0000
7	99,999,999.00	EA	000000000100027325	CAPE CLEAR STUDIO DEVELOPER SEAT 1-10 LICENSES	2,800.0000
8	99,999,999.00	EA	000000000100027326	CAPE CLEAR STUDIO DEVELOPER SEAT 11-25 LICENSES	2,520.0000
10	99,999,999.00	EA	000000000100027328	CAPE CLEAR STUDIO DEVELOPER SEAT 51-100 LICENSES	1,960.0000
11	99,999,999.00	EA	000000000100027329	CAPE CLEAR STUDIO DEVELOPER SEAT 101-200 LICENSES	1,680.0000
12	99,999,999.00	EA	000000000100027330	CAPE CLEAR STUDIO DEVELOPER SEAT > 200 LICENSES	1,400.0000
13	99,999,999.00	HUR	0000000000100027331	PROJECT MANAGER	125.0000
14	99,999,999.00	HUR	0000000000100027332	BUSINESS ANALYST	115.0000
15	99,999,999.00	HUR	0000000000100027333	TECHNICAL ARCHITECT	125.0000
16	99,999,999.00	HUR	0000000000100027334	SENIOR DEVELOPER	115.0000
17	99,999,999.00	HUR	0000000000100027335	JUNIOR DEVELOPER	85.0000
18	99,999,999.00	EA	000000000100027327	CAPE CLEAR STUDIO DEVELOPER SEAT 26-50 LICENSES	2,240.0000

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Orders are to be delivered only upon receipt of properly approved Quantity Purchase Award Release.

Line Number	Quantity	UNIT	Article and Description	Unit Price
			The following UN/CEFACT Unit of Measure Common Codes are used in this document:	
		EA	Each	
		HUR	Hour	

Signature of Purchasing Officer	Typed Name	Signature Of Approval Office Of the State Attorney General	
	Date Signed	Typed Name	Date Signed
Authorized Signature	Indiana Department Of Administration Procurement Division 402 West Washington Street, Rm W468 Indianapolis, Indiana 46204 Telephone: (317) 232-3053		

PROFESSIONAL/PERSONAL SERVICES CONTRACT

This Contract (the "Contract"), entered into by and between the Indiana Office of Technology (the "State") and Cape Clear Software, Inc. (including its subsidiaries) (the "Contractor"), is executed pursuant to the terms and conditions set forth herein. In consideration of those mutual undertakings and covenants, the parties agree as follows:

WHEREAS, it was determined that the State required technical products and services for the development of an enterprise service bus solution for agency systems;

NOW THEREFORE, the parties enter into this contract for the State to purchase the enterprise service bus products and services as described herein pursuant to the following terms and conditions:

1. Duties of Contractor.

The Contractor shall provide the following relative to the Contract:

- A. Cape Clear ESB (Server Environment) licenses;
- B. Cape Clear Studio (Developer Seat) licenses;
- C. Unlimited Enterprise License option for all Cape Clear licenses for all agencies of the State of Indiana;
- D. Maintenance for all Cape Clear licenses;
- E. Consulting services for Project Manager, Technical Architect, Business Analyst, Senior Developer and Junior Developer. Services will include, but are not limited to, product installations, architecture/infrastructure development and agency implementations. Services must be approved in advance by the Contractor and the State using the Enterprise Service Bus Work Order (Attachment A), incorporated herein by reference.

The Contract will modify, delete, or amend certain terms and conditions set forth in the attached Form Contracts ("the Form Contracts") titled "Software License and Services Agreement" (Attachment B) consisting of six (6) pages without terms on both sides, and "Standard Technical Support Service Policy" (Attachment C) consisting of six (6) pages without terms on both sides, prepared by Contractor. This Contract and the Form Contracts are incorporated into each other and, when read together, shall constitute one integrated document. Any inconsistency, conflict, or ambiguity between this Contract and the Form Contracts shall be resolved by giving precedence and effect to this Contract.

By mutual agreement of the parties, the following terms and conditions are deleted from the Form Contracts:

- A. Any provision requiring the State of Indiana to provide insurance
- B. Any provision requiring the State of Indiana to provide indemnity
- C. Any provision providing that the Contract be construed in accordance with laws other than those of the State of Indiana
- D. Any provision providing that suit be brought in any state other than Indiana
- E. Any provision providing for resolution of contract disputes
- F. Any provision requiring the State of Indiana to pay any taxes

- G. Any provision requiring the State of Indiana to pay penalties, liquidated damages, interest or attorney's fees
- H. Any provision modifying the statute of limitations provided by Indiana statute.
- I. Any provision relating to the time within which a claim must be made.
- J. Any provision requiring payment of consideration in advance unless authorized by an exception listed in IC 4-13-2-20
- K.. Any provision limiting disclosure of the contract in violation of the Access to Public Records Act, IC 5-14-3-3.5
- L.. Any provision giving the Form Contracts precedence over this Contract

2. Consideration

- A. The Contractor will be paid at the following rate for individual purchases of Cape Clear ESB (Server Environment) licenses:

<u>Number of licenses</u>	<u>Volume Discount</u>	<u>Cost per License</u>
1-10	20%	\$28,000
11-25	28%	\$25,200
26-50	36%	\$22,400
51-100	44%	\$19,600
101-200	52%	\$16,800
More than 200	60%	\$14,000

- B. The Contractor will be paid at the following rate for individual purchases of Cape Clear Studio (Developer Seat) licenses:

<u>Number of licenses</u>	<u>Volume Discount</u>	<u>Cost per License</u>
1-10	20%	\$2,800
11-25	28%	\$2,520
26-50	36%	\$2,240
51-100	44%	\$1,960
101-200	52%	\$1,680
More than 200	60%	\$1,400

- C. Should the State of Indiana spend \$2 million on individual software licensing (support/maintenance or professional services not included), within a 2-year period, Cape Clear will provide the State of Indiana an Enterprise ESB License at the State government agency/department level for products identified in paragraphs 2a and 2b above. Local government agencies and departments may buy off the same discounted pricing matrix referenced above at any time during the contract period, however, these transactions do not contribute to attainment of the \$2 million State of Indiana Enterprise License.
- D. Annual maintenance will be 23% of the cost of the purchased licenses for all Cape Clear licenses. The Contractor will be paid in arrears quarterly for one-fourth of the annual maintenance due (5.75% of the cost of the purchased Cape Clear licenses).
- E. The Contractor will be paid for services not to exceed the following hourly rates:
 Project Manager \$125 per hour

Technical Architect	\$125 per hour
Business Analyst	\$115 per hour
Senior Developer	\$115 per hour
Junior Developer	\$85 per hour

3. Term

This Contract shall be effective for a period of two years. It shall commence upon execution by the Contractor and all the legally authorized representatives of the State as required under Indiana law and shall remain in effect for two (2) years from the date of commencement.

The following paragraphs 4 through 47 are defined by IDOA as State Boilerplate clauses. State Boilerplate clauses shall remain unaltered and in their standard form, unless any changes or alterations are documented as required under Paragraph 47, "Boilerplate Affirmation Clause."

4. Access to Records. The Contractor and its subcontractors, if any, shall maintain all books, documents, papers, accounting records, and other evidence pertaining to all costs incurred under this Contract. They shall make such materials available at their respective offices at all reasonable times during this Contract, and for three (3) years from the date of final payment under this Contract, for inspection by the State or its authorized designees. Copies shall be furnished at no cost to the State if requested.

5. Assignment; Successors. The Contractor binds its successors and assignees to all the terms and conditions of this Contract. The Contractor shall not assign or subcontract the whole or any part of this Contract without the State's prior written consent. The Contractor may assign its right to receive payments to such third parties as the Contractor may desire without the prior written consent of the State, provided that the Contractor gives written notice (including evidence of such assignment) to the State thirty (30) days in advance of any payment so assigned. The assignment shall cover all unpaid amounts under this Contract and shall not be made to more than one party. Notwithstanding the foregoing or anything to the contrary, the Contractor may, without the consent of the State, but upon prior notice to the State (such notice not less than twenty (20) days), assign this Contract and its rights hereunder as part of a corporate reorganization or to an entity which has acquired or succeeded to a substantial part of the Contractor's business and which undertakes in writing to fully perform and discharge the Contractor's obligations and liabilities hereunder.

6. Audits. The Contractor acknowledges that it may be required to submit to an audit of funds paid through this Contract. Any such audit shall be conducted in accordance with IC 5-11-1, et. seq. and audit guidelines specified by the State.

7. Authority to Bind Contractor. The signatory for the Contractor represents that he/she has been duly authorized to execute this Contract on behalf of the Contractor and has obtained all necessary or applicable approvals to make this Contract fully binding upon the Contractor when his/her signature is affixed, and certifies that this Contract is not subject to further acceptance by the Contractor when accepted by the State.

8. Changes in Work. The Contractor shall not commence any additional work or change the scope of the work until authorized in writing by the State. No claim for additional compensation shall be made in the absence of a prior written approval executed by all signatories hereto.

9. Compliance with Laws.

A. The Contractor shall comply with all applicable federal, state and local laws, rules, regulations and ordinances, and all provisions required thereby to be included herein are hereby incorporated by reference. The enactment of any state or federal statute or the promulgation of rules or regulations thereunder after execution of this Contract shall be reviewed by the State and the Contractor to determine whether the provisions of this Contract require formal modification.

B. The Contractor and its agents shall abide by all ethical requirements that apply to persons who have a business relationship with the State as set forth in IC § 4-2-6 *et seq.*, IC § 4-2-7, *et seq.*, the regulations promulgated thereunder, and Executive Order 04-08, dated April 27, 2004. If the Contractor is not familiar with these ethical requirements, the Contractor should refer any questions to the Indiana State Ethics Commission, or visit the Indiana State Ethics Commission website at <http://www.in.gov/ethics/>. If the Contractor or its agents violate any applicable ethical standards, the State may, in its sole discretion, terminate this Contract immediately upon notice to the Contractor. In addition, the Contractor may be subject to penalties under IC §§ 4-2-6 and 4-2-7.

C. The Contractor certifies by entering into this Contract that neither it nor its principal(s) is presently in arrears in payment of taxes, permit fees or other statutory, regulatory or judicially required payments to the State. The Contractor agrees that any payments currently due to the State may be withheld from payments due to the Contractor. Additionally, further work or payments may be withheld, delayed, or denied and/or this Contract suspended until the Contractor is current in its payments and has submitted proof of such payment to the State.

D. The Contractor warrants that it has no current, pending or outstanding criminal, civil, or enforcement actions initiated by the State, and agrees that it will immediately notify the State of any such actions. During the term of such actions, the Contractor agrees that the State may delay, withhold, or deny work under any supplement, amendment, change order or other contractual device issued pursuant to this Contract.

E. If a valid dispute exists as to the Contractor's liability or guilt in any action initiated by the State or its agencies, and the State decides to delay, withhold, or deny work to the Contractor, the Contractor may request that it be allowed to continue, or receive work, without delay. The Contractor must submit, in writing, a request for review to the Indiana Department of Administration (IDOA) following the procedures for disputes outlined herein. A determination by IDOA shall be binding on the parties.

F. Any payments that the State may delay, withhold, deny, or apply under this section shall not be subject to penalty or interest under IC § 5-17-5.

G. The Contractor warrants that the Contractor and its subcontractors, if any, shall obtain and maintain all required permits, licenses, registrations, and approvals, as well as comply with all health, safety, and environmental statutes, rules, or regulations in the performance of work

activities for the State. Failure to do so may be deemed a material breach of this Contract and grounds for immediate termination and denial of further work with the State.

H. The Contractor affirms that, if it is an entity described in IC Title 23, it is properly registered and owes no outstanding reports to the Indiana Secretary of State.

I. As required by IC 5-22-3-7:

(1) the Contractor and any principals of the Contractor certify that (A) the Contractor, except for de minimis and nonsystematic violations, has not violated the terms of (i) IC 24-4.7 [Telephone Solicitation Of Consumers], (ii) IC 24-5-12 [Telephone Solicitations] , or (iii) IC 24-5-14 [Regulation of Automatic Dialing Machines] in the previous three hundred sixty-five (365) days, even if IC 24-4.7 is preempted by federal law; and (B) the Contractor will not violate the terms of IC 24-4.7 for the duration of the Contract, even if IC 24-4.7 is preempted by federal law.

(2) The Contractor and any principals of the Contractor certify that an affiliate or principal of the Contractor and any agent acting on behalf of the Contractor or on behalf of an affiliate or principal of the Contractor (A) except for de minimis and nonsystematic violations, has not violated the terms of IC 24-4.7 in the previous three hundred sixty-five (365) days, even if IC 24-4.7 is preempted by federal law; and (B) will not violate the terms of IC 24-4.7 for the duration of the Contract, even if IC 24-4.7 is preempted by federal law.

10. Condition of Payment. All services provided by the Contractor under this Contract must be performed in a professional manner in accordance with applicable industry standards in accordance with all applicable federal, state, local laws, ordinances, rules and regulations and the Contractor will use all reasonable efforts to complete the services in accordance with the schedule set forth in any work order, subject to the State's performance of its responsibilities and except as prevented by acts or occurrences beyond the Contractor's control. The State shall not be required to pay for work inconsistent with this Contract or performed in violation of any federal, state or local statute, ordinance, rule or regulation.

11. Confidentiality of State Information. The Contractor understands and agrees that data, materials, and information disclosed to the Contractor may contain confidential and protected information. The Contractor covenants that data, material and information gathered, based upon or disclosed to the Contractor for the purpose of this Contract, will not be disclosed to or discussed with third parties without the prior written consent of the State.

12. Conflict of Interest.

A. As used in this section:

"Immediate family" means the spouse and the unemancipated children of an individual.

"Interested party," means:

1. The individual executing this Contract;
2. An individual who has an interest of three percent (3%) or more of the Contractor, if the Contractor is not an individual; or
3. Any member of the immediate family of an individual specified under subdivision 1 or 2.

"Department" means the Indiana Department of Administration.

"Commission" means the State Ethics Commission.

- B. The Department may cancel this Contract without recourse by the Contractor if any interested party is an employee of the State.
- C. The Department will not exercise its right of cancellation under section B, above, if the Contractor gives the Department an opinion by the Commission indicating that the existence of this Contract and the employment by the State of the interested party does not violate any statute or rule relating to ethical conduct of State employees. The Department may take action, including cancellation of this Contract, consistent with an opinion of the Commission obtained under this section.
- D. The Contractor has an affirmative obligation under this Contract to disclose to the Department when an interested party is or becomes an employee of the State. The obligation under this section extends only to those facts that the Contractor knows or reasonably could know.

13. Continuity of Services.

- A. The Contractor recognizes that the service(s) to be performed under this Contract are vital to the State and must be continued without interruption and that, upon Contract expiration, a successor, either the State or another contractor, may continue them. The Contractor agrees to, subject to mutually agreed to compensation:
 - 1. Furnish phase-in training, and
 - 2. Exercise all reasonable efforts and cooperation to effect an orderly and efficient transition to a successor.
- B. The Contractor shall, subject to mutually agreed to compensation, upon the State's written notice:
 - 1. Furnish phase-in, phase-out services for up to sixty (60) days after this Contract expires, and
 - 2. Negotiate in good faith a plan with a successor to determine the nature and extent of phase-in, phase-out services required.

The plan shall specify a training program and a date for transferring responsibilities for each division of work described in the plan, and shall be subject to the State's approval. The Contractor shall provide sufficient experienced personnel during the phase-in, phase-out period to ensure that the services called for by this Contract are maintained at the required level of proficiency.

- C. The Contractor shall allow as many personnel as practicable to remain on the job to help the successor maintain the continuity and consistency of the services required by this Contract.
- D. The Contractor shall be reimbursed for all reasonable phase-in, phase-out costs and expenses (i.e., costs and expenses incurred within the agreed period after contract expiration that result from phase-in, phase-out operations), in addition to mutually agreed to rates for such extended services by the Contractor.

14. Debarment and Suspension.

- A. The Contractor certifies by entering into this Contract that neither it nor its principals nor any of its subcontractors are presently debarred, suspended, proposed for debarment, declared

ineligible or voluntarily excluded from entering into this Contract by any federal agency or by any department, agency or political subdivision of the State. The term "principal" for purposes of this Contract means an officer, director, owner, partner, key employee or other person with primary management or supervisory responsibilities, or a person who has a critical influence on or substantive control over the operations of the Contractor.

B The Contractor certifies that it has verified the state and federal suspension and debarment status for all subcontractors receiving funds under this Contract and shall be solely responsible for any recoupment, penalties or costs that might arise from use of a suspended or debarred subcontractor. The Contractor shall immediately notify the State if any subcontractor becomes debarred or suspended, and shall, at the State's request, take all steps required by the State to terminate its contractual relationship with the subcontractor for work to be performed under this Contract.

15. Default by State. If the State, thirty (30) days after receipt of written notice, fails to correct or cure any material breach of this Contract, the Contractor may cancel and terminate this Contract.

16. Disputes.

A. Should any disputes arise with respect to this Contract, the Contractor and the State agree to act immediately to resolve such disputes.

B. The Contractor agrees that, the existence of a dispute notwithstanding, it will continue without delay to carry out all its responsibilities under this Contract that are not affected by the dispute. The Contractor shall make no claim within ten (10) working days following notification in writing by either party of the existence of a dispute, and the following procedure shall apply:

1. The parties agree to resolve such matters through submission of their dispute to the Commissioner of the Indiana Department of Administration. The Commissioner shall reduce a decision to writing and mail or otherwise furnish a copy thereof to the Contractor and the State within ten (10) working days after presentation of such dispute for action. The Commissioner's decision shall be final and conclusive unless either party mails or otherwise furnishes to the Commissioner, within ten (10) working days after receipt of the Commissioner's decision, a written appeal. Within ten (10) working days of receipt by the Commissioner of a written request for appeal, the decision may be reconsidered. If no reconsideration is provided within ten (10) working days, the parties may mutually agree to submit the dispute to arbitration or mediation for a determination, or otherwise the dispute may be submitted to an Indiana court of competent jurisdiction.

2. The State may withhold payments on disputed items pending resolution of the dispute. The unintentional nonpayment by the State to the Contractor of one or more invoices not in dispute in accordance with the terms of this Contract will not be cause for Contractor to terminate this Contract, provided that such default is cured within thirty (30) days from the State's receipt of the Contractor's notification of such breach.

17. Drug-Free Workplace Certification. The Contractor hereby covenants and agrees to make a good faith effort to provide and maintain a drug-free workplace. The Contractor will give written notice to the State within ten (10) days after receiving actual notice that the Contractor or

an employee of the Contractor in the State of Indiana has been convicted of a criminal drug violation occurring in the workplace. False certification or violation of this certification may result in sanctions including, but not limited to, suspension of contract payments, termination of this Contract and/or debarment of contracting opportunities with the State for up to three (3) years.

In addition to the provisions of the above paragraphs, if the total contract amount set forth in this Contract is in excess of \$25,000.00, the Contractor hereby further agrees that this Contract is expressly subject to the terms, conditions, and representations of the following certification:

This certification is required by Executive Order No. 90-5, April 12, 1990, issued by the Governor of Indiana. No award of a contract shall be made, and no contract, purchase order or agreement, the total amount of which exceeds \$25,000.00, shall be valid, unless and until this certification has been fully executed by the Contractor and made a part of the contract or agreement as part of the contract documents.

The Contractor certifies and agrees that it will provide a drug-free workplace by:

- A. Publishing and providing to all of its employees a statement notifying them that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the Contractor's workplace, and specifying the actions that will be taken against employees for violations of such prohibition;
- B. Establishing a drug-free awareness program to inform its employees of (1) the dangers of drug abuse in the workplace; (2) the Contractor's policy of maintaining a drug-free workplace; (3) any available drug counseling, rehabilitation and employee assistance programs; and (4) the penalties that may be imposed upon an employee for drug abuse violations occurring in the workplace;
- C. Notifying all employees in the statement required by subparagraph (A) above that as a condition of continued employment, the employee will (1) abide by the terms of the statement; and (2) notify the Contractor of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such conviction;
- D. Notifying the State in writing within ten (10) days after receiving notice from an employee under subdivision (C)(2) above, or otherwise receiving actual notice of such conviction;
- E. Within thirty (30) days after receiving notice under subdivision (C)(2) above of a conviction, imposing the following sanctions or remedial measures on any employee who is convicted of drug abuse violations occurring in the workplace: (1) taking appropriate personnel action against the employee, up to and including termination; or (2) requiring such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a federal, state or local health, law enforcement, or other appropriate agency; and
- F. Making a good faith effort to maintain a drug-free workplace through the implementation of subparagraphs (A) through (E) above.

18. Employment Option. This Section Intentionally Deleted.

19. Force Majeure. In the event that either party is unable to perform any of its obligations under this Contract or to enjoy any of its benefits because of natural disaster or decrees of governmental bodies not the fault of the affected party (hereinafter referred to as a "Force Majeure Event"), the party who has been so affected shall immediately give notice to the other party and shall do everything reasonably possible to resume performance. Upon receipt of such notice, all obligations under this Contract shall be immediately suspended. If the period of nonperformance exceeds thirty (30) days from the receipt of notice of the Force Majeure Event, the party whose ability to perform has not been so affected may, by giving written notice, terminate this Contract.

20. Funding Cancellation. When the Director of the Office of Management and Budget makes a written determination that funds are not appropriated or otherwise available to support continuation of performance of this Contract, this Contract shall be canceled. A determination by the Budget Director that funds are not appropriated or otherwise available to support continuation of performance shall be final and conclusive.

21. Governing Laws. This Contract shall be construed in accordance with and governed by the laws of the State of Indiana and suit, if any, must be brought in the State of Indiana.

22. Indemnification. The Contractor agrees to indemnify, defend, and hold harmless the State, its agents, officers, and employees from all claims and suits including court costs, reasonable attorney's fees, and other expenses due to any bodily injury, death or tangible property damage to the extent caused by any negligent, reckless or willful act or omission of the Contractor and/or its subcontractors, if any, in the performance of this Contract. The State shall **not** provide such indemnification to the Contractor.

23. Independent Contractor. Both parties hereto, in the performance of this Contract, shall act in an individual capacity and not as agents, employees, partners, joint venturers or associates of one another. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purposes whatsoever. Neither party will assume liability for any injury (including death) to any persons, or damage to any property, arising out of the acts or omissions of the agents, employees or subcontractors of the other party.

The Contractor shall be responsible for providing all necessary unemployment and workers' compensation insurance for the Contractor's employees.

24. Information Technology Enterprise Architecture Requirements. If the Contractor provides any information technology related products or services to the State, the Contractor shall comply with all IOT standards, policies and guidelines, which are online at <http://iot.in.gov/architecture/>. The Contractor specifically agrees that all hardware, software and services provided to or purchased by the State shall be compatible with the principles and goals contained in the electronic and information technology accessibility standards adopted under Section 508 of the Federal Rehabilitation Act of 1973 (29 U.S.C. 794d) and IC 4-13.1-3. Any deviation from these architecture requirements must be approved in writing by IOT in advance. The State may terminate this Contract for default if the Contractor fails to cure a breach of this provision within a reasonable time.

25. Insurance.

A. The Contractor shall secure and keep in force during the term of this Contract, the following insurance coverages, covering the Contractor for any and all claims of any nature which may in any manner arise out of or result from this Contract:

1. Commercial general liability, including contractual coverage, and products or completed operations coverage (if applicable), with minimum liability limits of \$700,000 per person and \$2,000,000 per occurrence unless additional coverage is required by the State.
2. Automobile liability with minimum liability limits of \$700,000 per person and \$2,000,000 per occurrence.
3. The Contractor shall provide proof of such insurance coverage by tendering to the undersigned State representative a certificate of insurance prior to the commencement of this Contract and proof of Workers compensation coverage meeting all statutory requirements of IC 22-3-2. In addition, proof of an "all states endorsement" covering claims occurring outside the State is required if any of the services provided under this Contract involve work outside of Indiana.

B. The Contractor's insurance coverage must meet the following additional requirements:

1. The insurer must have a certificate of authority issued by the Indiana Department of Insurance.
2. Any deductible or self-insured retention amount or other similar obligation under the insurance policies shall be the sole obligation of the Contractor.
3. The State will be defended, indemnified and held harmless to the full extent of any coverage actually secured by the Contractor in excess of the minimum requirements set forth above. The duty to indemnify the State under this Contract shall not be limited by the insurance required in this Contract.
4. The insurance required in this Contract, through a policy or endorsement(s), shall include a provision that the policy and endorsements may not be canceled or modified without thirty (30) days' prior written notice to the undersigned State agency.

Failure to provide insurance as required in this Contract may be deemed a material breach of contract entitling the State to immediately terminate this Contract. The Contractor shall furnish a certificate of insurance and all endorsements to the State before the commencement of this Contract.

26. Key Person(s).

A. If both parties have designated that certain individual(s) are essential to the services offered, the parties agree that should such individual(s) leave their employment during the term of this Contract for whatever reason, the State shall have the right to terminate this Contract upon thirty (30) days prior written notice.

- B. In the event that the Contractor is an individual, that individual shall be considered a key person and, as such, essential to this Contract. Substitution of another for the Contractor shall not be permitted without express written consent of the State.
- C. Nothing in sections A and B, above shall be construed to prevent the Contractor from using the services of others to perform tasks ancillary to those tasks which directly require the expertise of the key person. Examples of such ancillary tasks include secretarial, clerical, and common labor duties. The Contractor shall, at all times, remain responsible for the performance of all necessary tasks, whether performed by a key person or others.

Key person(s) to this Contract is/are None

27. Licensing Standards. The Contractor and its employees and subcontractors shall comply with all applicable licensing standards, certification standards, accrediting standards and any other laws, rules or regulations governing services to be provided by the Contractor pursuant to this Contract. The State shall not be required to pay the Contractor for any services performed when the Contractor, its employees or subcontractors are not in compliance with such applicable standards, laws, rules or regulations. If licensure, certification or accreditation expires or is revoked, or if disciplinary action is taken against the applicable licensure, certification or accreditation, the Contractor shall notify the State immediately and the State, at its option, may immediately terminate this Contract.

28. Merger & Modification. This Contract constitutes the entire agreement between the parties. No understandings, agreements, or representations, oral or written, not specified within this Contract will be valid provisions of this Contract. This Contract may not be modified, supplemented or amended, in any manner, except by written agreement signed by all necessary parties.

29. Minority and Women's Business Enterprises Compliance. The Contractor agrees to comply fully with the provisions of 25 IAC 5 and any participation plan that may have been submitted to the State.

The following MBE's and WBE's listed on the Minority and Women's Business Enterprises Division directory of certified firms will be participating in this Contract.

<u>MBE/WBE</u>	<u>PHONE</u>	<u>COMPANY NAME</u>	<u>SCOPE OF PRODUCTS and/or SERVICES</u>	<u>UTILIZATION DATE</u>	<u>AMOUNT</u>
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None

30. Nondiscrimination. Pursuant to IC 22-9-1-10 and the Civil Rights Act of 1964, the Contractor and its subcontractors shall not discriminate against any employee or applicant for employment in the performance of this Contract. The Contractor shall not discriminate with respect to the hire, tenure, terms, conditions or privileges of employment or any matter directly or indirectly related to employment, because of race, color, religion, sex, disability, national origin or ancestry. Breach of this covenant may be regarded as a material breach of this Contract. The Contractor's execution of this Contract also signifies compliance with applicable federal laws, regulations and executive orders prohibiting discrimination in the provision of services based on race, color, national origin, age, sex, disability or status as a veteran.

31. Notice to Parties. Whenever any notice, statement or other communication is required under this Contract, it shall be sent to the following addresses, unless otherwise specifically advised.

A. Notices to the State shall be sent to:

Indiana Office of Technology
Attention: LEGAL NOTICE
Indiana Government Center North, Room N-551
100 North Senate Avenue
Indianapolis, IN 46204

B. Invoices to the State shall be sent to:

Indiana Office of Technology
Attention: Accounts Payable
Indiana Government Center North, Room N551
100 N. Senate Avenue
Indianapolis, IN 46204

C. Notices to the Contractor shall be sent to:

Cape Clear Software, Inc.
Attention: Bernie Bradley, Corporate Controller
880 Winter Street, Suite 300
Waltham, MA 02451

D. As required by IC 4-13-2-14.8, payments to the Contractor shall be made via electronic funds transfer in accordance with instructions filed by the Contractor with the Indiana Auditor of State.

32. Order of Precedence; Incorporation by Reference. Any inconsistency or ambiguity in the Contract shall be resolved by giving precedence in the following order: (1) The Contract, (2) the Form Contracts prepared by the Contractor, and (3) attachments prepared by the State. All of the foregoing are incorporated fully by reference. All attachments, and all documents referred to in this paragraph are hereby incorporated fully by reference.

33. Ownership of Documents and Materials. All documents, records, programs, data, film, tape, articles, memoranda, and other materials not developed or licensed by the Contractor prior to execution of this Contract or outside the scope of this Contract, but specifically developed under this Contract by the Contractor for the State under and as specified in the pertinent work order shall be considered "work for hire" and the Contractor transfers any ownership claim to the State and all such materials will be the property of the State. Use of these materials, other than related to contract performance by the Contractor, without the prior written consent of the State, is prohibited. During the performance of this Contract, the Contractor shall be responsible for any loss of or damage to these materials developed for or supplied by the State and used to develop or assist in the services provided while the materials are in the possession of the Contractor. Any loss or damage thereto shall be restored at the Contractor's expense. Full, immediate and unrestricted access to the work product of the Contractor during the term of this

Contract shall be available to the State. Notwithstanding the foregoing or anything to the contrary, the Contractor and its licensors hereby reserve and retain ownership of all other intellectual property which the Contractor creates, licenses, or otherwise acquires, including without limitation the Contractor Product. All Product and error corrections, modifications, and updates thereto shall be deemed the Contractor's Confidential Information, with all rights and ownership therein remaining solely with the Contractor. The State acknowledges that the Contractor provides services and products to other of its customers that are similar to the Services provided hereunder. The State agrees that nothing in this Contract is intended or should be interpreted to prevent or inhibit the Contractor from continuing or commencing to provide such services and products to others or to customize the Contractor Products for others. The Contractor may, in its sole discretion, develop, use, market, and license any software that is similar to that which was developed or delivered by the Contractor for the State hereunder, if any, provided that the Contractor does not utilize any of the State's Confidential Information.

34. Payments. All payments shall be made in arrears in conformance with State fiscal policies and procedures and, as required by IC 4-13-2-14.8, by electronic funds transfer to the financial institution designated by the Contractor in writing unless a specific waiver has been obtained from the Indiana Auditor of State. No payments will be made in advance of receipt of the goods or services that are the subject of this Contract except as permitted by IC 4-13-2-20.

35. Penalties/Interest/Attorney's Fees. The State will in good faith perform its required obligations hereunder and does not agree to pay any penalties, liquidated damages, interest or attorney's fees, except as permitted by Indiana law, in part, IC 5-17-5, IC 34-54-8, and IC 34-13-1.

Notwithstanding the provisions contained in IC 5-17-5, any liability resulting from the State's failure to make prompt payment shall be based solely on the amount of funding originating from the State and shall not be based on funding from federal or other sources.

36. Progress Reports. The Contractor shall submit progress reports to the State upon request. The report shall be oral, unless the State, upon receipt of the oral report, should deem it necessary to have it in written form. The progress reports shall serve the purpose of assuring the State that work is progressing in line with the schedule, and that completion can be reasonably assured on the scheduled date.

37. Publicity. The Contractor, its subcontractors, if any, nor any other organization contracted by or working with Contractor or its subcontractors shall not refer to the existence of this Contract in any press release, advertising or materials distributed to prospective customers, without first obtaining the prior written consent of the State.

38. Renewal Option. This Contract may be renewed under the same terms and conditions, subject to the approval of the Commissioner of the Department of Administration and the State Budget Director in compliance with IC 5-22-17-4. The term of the renewed contract may not be longer than the term of the original contract.

39. Security and Privacy of Health Information. The Contractor agrees to comply with all requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) in all activities related to this Contract, to maintain compliance throughout the life of this Contract, to

operate any systems used to fulfill the requirements of this Contract in full compliance with HIPAA and to take no action which adversely affects the State's HIPAA compliance.

The parties acknowledge that the Department of Health and Human Services has issued the Final Rule, as amended from time to time, on the Standards for Privacy of Individually Identifiable Health Information, as required by HIPAA. To the extent required by the provisions of HIPAA and regulations promulgated thereunder, the Contractor covenants that it will appropriately safeguard Protected Health Information (PHI), as defined by the regulations, which is made available to or obtained by the Contractor in the course of its work under this Contract. The Contractor agrees to comply with applicable requirements of law relating to PHI with respect to any task or other activity it performs for the State as required by the final regulations.

40. Severability. The invalidity of any section, subsection, clause or provision of this Contract shall not affect the validity of the remaining sections, subsections, clauses or provisions of this Contract.

41. Substantial Performance. This Contract shall be deemed to be substantially performed only when fully performed according to its terms and conditions and any written amendments or supplements.

42. Taxes. The State is exempt from most state and local taxes and many federal taxes. The State will not be responsible for any taxes levied on the Contractor as a result of this Contract.

43. Termination for Convenience. This Contract may be terminated, in whole or in part, by the State whenever, for any reason, the State determines that such termination is in its best interest. Termination of services shall be effected by delivery to the Contractor of a Termination Notice at least thirty (30) days prior to the termination effective date, specifying the extent to which performance of services under such termination becomes effective. The Contractor shall be compensated for services properly rendered prior to the effective date of termination. The State will not be liable for services performed after the effective date of termination. The Contractor shall be compensated for services herein provided but in no case shall total payment made to the Contractor exceed the original contract price or shall any price increase be allowed on individual line items if canceled only in part prior to the original termination date.

44. Termination for Default.

A. With the provision of thirty (30) days notice to the Contractor, the State may terminate this Contract in whole or in part if the Contractor fails to:

1. Correct or cure any material breach of this Contract;
2. Subject to the terms and conditions of this Contract, deliver the supplies or perform the services within the time specified in this Contract or any extension;
3. Subject to the terms and conditions of this Contract, make progress so as to endanger performance of this Contract; or
4. Perform any of the other material provisions of this Contract.

For the purpose of the Contract, a material breach will occur if the Contractor is unable (except with regards to a force majeure event, as set forth in Section 19 hereto) or unwilling to provide the licenses, maintenance or consulting services identified in Section 1 of the Contract.

B. If the State terminates this Contract in whole or in part, the Contractor shall continue the work not terminated.

C. The State shall pay the contract price for completed supplies delivered and services accepted. The State shall sign off on the services delivered within ten (10) days of completion. The State's signature shall represent acceptance of the services completed. During such period the State may provide the Contractor with written notice, in reasonable detail, of the failure of any services, if any, to conform with its specifications, as mutually agreed to by the State and the Contractor, and the Contractor will use all reasonable efforts to correct such deficiency. Unless such notice of nonconformity is provided to the Contractor within such period, and irrespective of whether or not the State has signed off on the services, the services will be deemed to have been accepted and signed-off by the State at the end of such ten (10) day period. Notwithstanding the foregoing or anything to the contrary, in no event shall the foregoing or any acceptance criteria, whatsoever, apply to any Products (including any updates or releases) and/or maintenance thereof delivered in connection with this Contract. The Contractor and the State shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The State may withhold from these amounts any sum the State determines in good faith to be necessary to protect the State against loss because of outstanding liens or claims of former lien holders.

D. The rights and remedies of the State in this clause are in addition to any other rights and remedies provided by law or equity or under this Contract.

45. Travel. No expenses for travel will be reimbursed unless specifically permitted under the scope of services or consideration provisions. Expenditures made by the Contractor for travel will be reimbursed at the current rate paid by the State and in accordance with the State Travel Policies and Procedures as specified in the current Financial Management Circular. Out-of-state travel requests must be reviewed by the State for availability of funds and for appropriateness per Circular guidelines.

46. Waiver of Rights. No right conferred on either party under this Contract shall be deemed waived, and no breach of this Contract excused, unless such waiver is in writing and signed by the party claimed to have waived such right.

47. Work Standards. The Contractor shall execute its responsibilities by following and applying at all times the highest professional and technical guidelines and standards. If the State becomes dissatisfied with the work product of or the working relationship with those individuals assigned to work on this Contract, the State may request in writing the replacement of any or all such individuals, and the Contractor shall grant such request

48. State Boilerplate Affirmation Clause. I swear or affirm under the penalties of perjury that I have not altered, modified or changed the State's Boilerplate contract clauses (as defined in the February, 2006 IDOA *Professional Services Contract Manual*) in any way except for the following clauses:

5. Assignment; Successors.

10. Condition of Payment.

- 13. Continuity of Services.
- 15. Default by State.
- 16. Disputes.
- 18. Employment Option.
- 19. Force Majeure.
- 22. Indemnification.
- 25. Insurance.
- 31. Notice to Parties
- 32. Order of Precedence; Incorporation by Reference.
- 33. Ownership of Documents and Materials.
- 42. Taxes.
- 44. Termination for Default.

THE REMAINDER OF THIS PAGE HAS BEEN LEFT BLANK INTENTIONALLY.

Non-Collusion and Acceptance

The undersigned attests, subject to the penalties for perjury, that he/she is the Contractor, or that he/she is the properly authorized representative, agent, member or officer of the Contractor, that he/she has not, nor has any other member, employee, representative, agent or officer of the Contractor, directly or indirectly, to the best of the undersigned's knowledge, entered into or offered to enter into any combination, collusion or agreement to receive or pay, and that he/she has not received or paid any sum of money or other consideration for the execution of this Contract other than that which appears upon the face of this Contract.

In Witness Whereof, Contractor and the State have, through their duly authorized representatives, entered into this Contract. The parties, having read and understood the foregoing terms of this Contract, do by their respective signatures dated below hereby agree to the terms thereof.

(Contractor:)

(Where Applicable)

By: _____

Printed Name: _____

Title: _____

Date: _____

Jeff M

JEFFREY MEND

PRESIDENT

25/10/06

Attested By: _____

Indiana Office of Technology

Karl B. Browning (for)
Karl B. Browning, Chief Information Officer

Date: _____

11/3/06

Department of Administration

Carrie Henderson (for)
Carrie Henderson, Commissioner

Date: _____

11-12-06

Office of Management and Budget

Charles E. Schalliol (for)
Charles E. Schalliol, Director

Date: _____

11/15/06

APPROVED as to Form and Legality:
Office of the Attorney General

Stephen Carter (for)
Stephen Carter, Attorney General

Date: _____

11/17/06

ATTACHMENT A

**ENTERPRISE SERVICE BUS
WORK ORDER**

ESB Contractor: Ciber Indiana LLC 390 North Madison Avenue Suite 200 Greenwood, IN 46142		State Agency:
Project Description (See attached Statement of Work)		Start Date:
		Completion Date:
Deliverable No. 1 [description]	Cost	\$0.00
Deliverable No. 2 [description]	Cost	\$0.00
Deliverable No. 3 [description]	Cost	\$0.00
Deliverable No. 4 [description]	Cost	\$0.00
Deliverable No. 5 [description]	Cost	\$0.00
Total Cost		\$0.00
Authorized Agency Signature		Authorized Vendor Signature
Date:		Date:
IOT Approval		
Date:		

ATTACHMENT B

CAPE CLEAR SOFTWARE, INC. SOFTWARE LICENSE AND SERVICES AGREEMENT AGREEMENT NUMBER:

This Agreement is made as of this 25 day of Oct 2006, 2006 (the "Effective Date") by and between Cape Clear Software, Inc. (including its subsidiaries), a Delaware corporation with its principal place of business at 880 Winter Street, Suite 300, Waltham, MA 02451 ("CAPE CLEAR") and _____ a _____ corporation with its principal place of business at _____ (the "Customer").

TERMS AND CONDITIONS OR ("AGREEMENT")

For the purposes of these Terms and Conditions, the following definitions shall apply:

"Application" shall mean the Customer's developed solutions and/or applications (whether incorporating Customer's own software and/or other third party software) which incorporate or make use of the Product in whole or in part, in accordance with these Terms and Conditions.

"Confidential Information" shall mean the Product, all parts, copies and modifications thereof and any other information, in whatever form, received by Customer from CAPE CLEAR which is identified as being proprietary or confidential at the time of disclosure or should reasonably be understood to be proprietary; provided, however, such information shall not be deemed Confidential Information if Customer can clearly establish by written evidence that it (a) is or becomes a part of the public domain through no act or omission of Customer; or (b) was in Customer's lawful possession prior to the disclosure and had not been obtained by Customer from CAPE CLEAR; or (c) is lawfully disclosed to Customer by a third party without restriction on disclosure; or (d) is independently developed by Customer without the use of any Confidential Information.

"Development Software" shall mean the portions of the Software that assists the Customer in the development of the Application but which are not accessible by operation of the Application.

"Deployment Software" shall mean the portions of the Software that are accessible by operation of the Application and that do not include any features of the Software which permit the development of the Application.

"Purchase Documentation" shall mean a notification of purchase provided by CAPE CLEAR to Customer which shall establish the Licenses which have been granted and the services which are to be provided under this Agreement.

"User" is defined as any individual or entity which utilizes the Software in any manner.

- 1. GRANT OF LICENSE:** (a) CAPE CLEAR grants to Customer a non-exclusive, non-transferable, limited license (the "License") to operate the computer programs (the "Software"), installed on the number of central processing units ("CPU") as defined and specified in the Purchase Documentation, in accordance with the user documentation (the "Documentation") thereto (collectively, the "Product") included in this installation solely for Customer's internal business operations for the sole purpose of developing and internally deploying Applications, in accordance with this Agreement. Customer may not utilize the Development Software for any deployment of Applications. Customer must acquire Deployment Software licenses from CAPE CLEAR in order, to deploy any Applications internally. Subject to the foregoing, use of the Software includes the right to utilize the Deployment Software as the host backend for an Application to permit third parties, who are under agreement with Customer to avail themselves of the web-services enabled by an Application ("Clients") to indirectly access and use over the Internet the Deployment Software, only as part of an Application running on Customer's internal system, provided that, (i) such Clients will not have any direct access to the Product, including without limitation the individual object code modules of particular routines in the Software; (ii) use of an Application shall be solely for such Client's internal use and not for any revenue generating purposes whatsoever; (iii) Customer will remain directly liable and responsible to CAPE CLEAR and its licensors for any performance of Customer's and/or its Client's obligations under this Agreement, and (iv) Customer shall indemnify and hold harmless CAPE CLEAR and its licensors and their respective officers, directors, employees and agents, from and against any and all claims, demands, costs and liabilities (including all reasonable attorneys' fees) arising out of or related to any representation, action or omission by such Clients inconsistent with the terms of this Agreement. The Parties hereby acknowledge and agree that any claim, demand or right of action arising on behalf of a Client from the use by it of the Product and/or any Confidential Information shall be solely against Customer

ATTACHMENT B

and not against CAPE CLEAR, and that a Client may not acquire any ownership interest in the Product, Confidential Information, any modification or derivative work thereof subject to this Agreement unless such Client also becomes a customer of CAPE CLEAR for the Product and CAPE CLEAR and such Client sign a written agreement granting the Client such an interest.

(b) A separate license is required for each CPU and/or User which accesses the Software; and only one copy of the Software may be licensed per instance of the Software and/or per machine. If no equipment is specified in the Purchase Documentation, this license is restricted to a single CPU and User. In addition, test licenses are restricted only to Customer's internal use of Software solely for testing purposes of Applications and not for any internal deployment and/or utilization. Notwithstanding the foregoing or anything to the contrary, in the absence of any associated Purchase Documentation this license will be deemed to be for evaluation purposes only and is only valid for a twenty-eight (28) day period immediately following the date the license was issued.

(c) Except as otherwise set forth above under this Section 1(a) above, no right is granted to sell, license, sublicense, embed, lease, rent or otherwise transfer the Software or use the Software for third party training, commercial time-sharing, hosting, application service provision or service bureau use, or allow any third party to have access to or use the Software for any reason. The term "Product" includes all Product updates provided in accordance with Technical Support (as defined below) and new versions of the Software and/or Documentation. From time to time after the date hereof Customer may wish to license additional copies of the Product. Such additional software programs will be deemed "Software" subject to the terms and conditions of this Agreement upon CAPE CLEAR's acceptance of Customer's order of such software programs.

(d) The parties agree that in the event of a conflict between the terms and conditions of this Agreement and any Purchase Documentation, the terms and conditions of the Purchase Documentation shall supersede, govern and control.

2. **OWNERSHIP OF THE PRODUCT; RESTRICTIONS ON USE:** CAPE CLEAR (or its licensors) owns and will retain all patent, copyright, trademark, trade secret and other proprietary rights in and to the Product. Customer's rights are limited to the License and the terms of this Agreement.

(a) Customer shall NOT make any copies of all or any part of the Confidential Information, except that Customer may make one copy of the Software for archival purposes only.

(b) Customer shall NOT translate, decompile, disassemble, reverse engineer or otherwise reduce the Software code, in whole or in part, to a human readable form.

(c) Customer shall NOT remove from any part of the Confidential Information any notice of proprietary rights or any disclaimer and shall ensure that all proprietary rights notices on Confidential Information are reproduced and applied to any authorized copies.

(d) Customer shall NOT sell, license, sub-license, rent or otherwise transfer the Product or License without the written permission of CAPE CLEAR.

(e) Customer shall NOT modify the Product, merge it with other software or documentation or create derivative works based in whole or in part, on the Product.

(f) Except as otherwise explicitly permitted hereunder, Customer shall NOT disclose or permit others to have access to the Confidential Information or any results of benchmark tests, including without limitation by means of timesharing, hosting, application service provision, remote computing services, networking and/or batch processing, unless CAPE CLEAR consents to such disclosure in writing, and Customer shall limit any disclosure to Customer's bona fide employees whose access is necessary to effect the purposes of this Agreement. Such employees shall be notified by Customer that any disclosure under this Agreement is made in confidence and shall be kept in confidence, and shall be subject to a binding agreement with Customer to protect the confidentiality of Confidential Information. Customer shall be responsible for any use or disclosure of Confidential Information by any of Customer's employees or agents, and shall protect the disclosed Confidential Information by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized dissemination or publication of the Confidential Information as Customer uses to protect Customer's own confidential information. The provision of this Section 2(f) shall survive termination or expiration of this Agreement for five (5) years thereafter, except that any restrictions on source code will survive indefinitely.

(g) Customer shall NOT, by itself or with others, participate in any illegal, deceptive, misleading or unethical practices including, but not limited to, disparagement of the Product or CAPE CLEAR or other practices which may be detrimental to the Product or CAPE CLEAR.

(h) Without prejudice to the foregoing, Customer shall take all such other steps as shall from time to time be necessary to protect CAPE CLEAR's Confidential Information and intellectual property rights in the Product.

3. **TERM AND TERMINATION:** The term of this Agreement and the License will continue for a period of one (1) year, unless this Agreement is terminated earlier as set forth herein. CAPE CLEAR may terminate this Agreement by written notice to

ATTACHMENT B

Customer specifying Customer's failure or default in the performance of any provisions of this Agreement and Customer fails to cure said failure or default to the satisfaction of CAPE CLEAR within ten (10) days after such notice. Notwithstanding the foregoing, this Agreement shall immediately terminate if (i) any proceeding in bankruptcy, receivership, liquidation, or insolvency is commenced by or against Customer; and/or (ii) Customer assigns or purports to assign the burden or benefit of this Agreement or otherwise dispose of any rights hereunder without CAPE CLEAR's prior written consent. Within five (5) days after termination of this Agreement, Customer will return all copies of the Product to CAPE CLEAR or destroy all copies of the Product, and have an appropriate authorized representative certify in writing the return or destruction of all copies of the Product. Upon termination, Customer shall immediately pay CAPE CLEAR the total fees depicted on any and all Purchase Documentation for Product, professional services and Technical Support. Customer will reimburse CAPE CLEAR for all reasonable costs incurred by CAPE CLEAR (including attorneys' fees) in collecting past due amounts hereunder. Any non-remedial breach shall entitle CAPE CLEAR to terminate this Agreement and all Licenses hereunder immediately upon written notice to Customer. This remedy shall not be an exclusive remedy and shall be in addition to any other remedies which CAPE CLEAR may have under this Agreement or otherwise.

4. **PAYMENT:** All shipments to Customer hereunder, if any, shall be F.O.B. CAPE CLEAR's facility. All costs for shipping and insurance shall be paid by Customer and risk of loss shall pass to Customer upon delivery to the carrier. All fees for Product licenses, Technical Support and/or professional services shall be due and payable by Customer thirty (30) calendar days after CAPE CLEAR's invoice date, unless otherwise specified in the Purchase Documentation. Customer shall pay to CAPE CLEAR interest of one percent (1%) compounded monthly or the maximum legal rate in effect, whichever is less, on any amount not paid when due. The fees for Product licenses, Technical Support and/or professional services purchased by Customer shall be **non-refundable and non-cancellable**. Except for taxes based upon CAPE CLEAR's net income, all prices and fees are exclusive of all sales, use or all other taxes, however designated or levied against the sale, licensing, delivery or use of the Product or any service. Any such tax CAPE CLEAR may be required to collect or pay shall be paid by Customer to CAPE CLEAR. If Customer is required by law to make any deduction or to withhold from any sum payable to CAPE CLEAR by Customer hereunder, then the sum payable by Customer upon which the deduction or withholding is based shall be increased to the extent necessary to ensure that, after all deduction and withholding, CAPE CLEAR receives and retains, free from liability for any deduction or withholding, a net amount equal to the amount CAPE CLEAR would have received and retained in the absence of required deduction or withholding. In addition to the price of any on-site services ordered by Customer, Customer shall reimburse CAPE CLEAR for reasonable food, lodging, and travel expenses incurred by CAPE CLEAR's employees in conjunction with any such services ordered by Customer. If such services are performed at CAPE CLEAR's premises, similar expenses incurred by Customer's employees shall be borne solely by Customer.
5. **CUSTOMER'S RESPONSIBILITIES FOR SELECTION AND USE:** Customer is responsible for the supervision, management and control of the use of the Product, and output of the Product, including, but not limited to: (1) selection of the Product to achieve Customer's intended results; (2) determining the appropriate uses of the Product in Customer's business; (3) establishing adequate independent procedures for testing the accuracy of the Product; and (4) establishing adequate backup to prevent the loss of data in the event of a Product malfunction.
6. **LIMITED WARRANTY; EXCEPTIONS AND DISCLAIMERS:** *Limited Warranty.* Subject to the other provisions in this Agreement, CAPE CLEAR warrants that the Product will substantially conform to the Documentation for a period of ninety (90) days after delivery to Customer. CAPE CLEAR's sole responsibility under this warranty will be, at its option, (1) to use reasonable efforts to correct such Product nonconformance or (2) to refund the license fee paid for the nonconforming Product upon its return. CAPE CLEAR does not warrant that the Product will be error free; that the use of the Product will meet Customer's requirements; nor that all Product errors will be corrected.

Exceptions. CAPE CLEAR's warranty does not apply insofar as: (1) any Product is subjected to misuse, neglect, accident or exposure to environmental conditions beyond those specified by CAPE CLEAR; (2) claims result from acts or omissions caused by persons other than CAPE CLEAR or from products, material or software not provided by CAPE CLEAR; (3) claims are not reported in writing to CAPE CLEAR within the warranty period and not documented by Customer; or (4) Customer uses a version of the Product that does not include all updates available from CAPE CLEAR.

Limitations on Warranties. THE EXPRESS WARRANTY SET FORTH IN THIS SECTION 6 IS THE ONLY WARRANTY GIVEN BY CAPE CLEAR WITH RESPECT TO THE PRODUCT OR ANY MATERIALS OR SERVICES FURNISHED HEREUNDER; CAPE CLEAR MAKES NO OTHER WARRANTIES, EXPRESS, IMPLIED OR ARISING BY CUSTOM OR TRADE USAGE, AND SPECIFICALLY DISCLAIMS THE WARRANTIES OF NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR ANY PARTICULAR PURPOSE. ORAL OR WRITTEN INFORMATION OR

ATTACHMENT B

ADVICE GIVEN BY CAPE CLEAR OR ITS AUTHORIZED REPRESENTATIVES SHALL NOT CHANGE THE SCOPE OF THIS WARRANTY. CAPE CLEAR SHALL NOT BE RESPONSIBLE FOR THE PERFORMANCE OF OUTPUT OBTAINED FROM THE SOFTWARE NOR FOR ANY LIABILITY TO ANY PARTY ARISING OUT OF USE OF THE PRODUCT. CUSTOMER SHALL NOT BE ENTITLED TO BRING ANY CLAIM, ACTION OR PROCEEDING ARISING OUT OF THE WARRANTY SET FORTH IN THIS SECTION 6 MORE THAN NINETY DAYS AFTER THE DATE ON WHICH THE BREACH OF WARRANTY OCCURRED.

7. **LIMITATIONS OF LIABILITY AND REMEDIES:** (a) THE LIABILITY OF CAPE CLEAR AND ITS LICENSORS IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE ARISING OUT OF OR IN CONNECTION WITH THE PRODUCT OR ANY MATERIALS OR SERVICES FURNISHED HEREUNDER SHALL NOT EXCEED THE LICENSE FEE CUSTOMER PAID FOR THE APPLICABLE COPY OF THE PRODUCT AND/OR PARTICULAR SERVICE THAT GAVE RISE TO ANY CLAIM. IN NO EVENT SHALL CAPE CLEAR OR ITS LICENSORS BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL, TORT (INCLUDING NEGLIGENCE) OR CONSEQUENTIAL DAMAGES (INCLUDING ANY DAMAGES RESULTING FROM LOSS OF USE, LOSS OF DATA, LOSS OF PROFITS OR LOSS OF BUSINESS) ARISING OUT OF OR IN CONNECTION WITH THE USE OF OR INABILITY TO USE THE PRODUCT OR ANY MATERIALS OR SERVICES FURNISHED HEREUNDER OR FROM CAPE CLEAR'S PERFORMANCE OF SERVICES, EVEN IF CAPE CLEAR OR ITS LICENSORS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

(b) Customer acknowledges that CAPE CLEAR has set its prices and entered into this Agreement in reliance upon the limitations of liability and the disclaimers of warranties and damages set forth herein, and that the same form an essential basis of the bargain between the parties. The parties agree that the limitations and exclusions of liability and disclaimers specified in this Agreement will survive and apply even if found to have failed of their essential purpose.

(c) Some jurisdictions do not allow the exclusion of certain warranties or the limitation or exclusion of liability for incidental or consequential damages. Accordingly, some of the above limitations of Sections 6 and 7 may not apply.

(d) Nothing in this Section shall confer any right or remedy upon Customer to which it would not otherwise be legally entitled.

8. **INDEMNITIES:** Customer shall indemnify CAPE CLEAR, and hold CAPE CLEAR harmless, from and against any and all losses, claims, damages, costs, charges, expenses, liabilities, demands, proceedings and actions which CAPE CLEAR may sustain or incur, or which may be brought or established against CAPE CLEAR by any person, which in any case arise out of or in relation to, or by reason of:

- (a) any breach by Customer of its obligations under this Agreement;
- (b) any unauthorized action or omission of Customer or its employees or staff;
- (c) any alteration, modification, adjustment or enhancement made, not by CAPE CLEAR, to the Product; and/or
- (d) any combination, connection, operation or use of the Product with any other equipment, software or documentation not supplied by CAPE CLEAR.

9. **INTELLECTUAL PROPERTY INFRINGEMENT INDEMNITY:** CAPE CLEAR shall defend or, at its option, settle, any claim, action or proceeding brought against Customer on grounds (a) that any Product infringes a patent, copyright, trade secret or other proprietary right or (b) that CAPE CLEAR does not have the right to grant the licenses granted herein, and shall indemnify Customer against all damages and costs finally awarded against Customer in any such action or proceeding which results from any such claim, and reasonable expenses (including reasonable attorneys' fees) incurred in connection with such claim. CAPE CLEAR shall have no liability under this Section 9 unless Customer (c) promptly notifies CAPE CLEAR in writing of the claim, (d) gives CAPE CLEAR full authority, information and assistance, at CAPE CLEAR's sole expense, to defend such claim and (e) gives CAPE CLEAR sole control of the defense of such claim and all negotiations for the compromise or settlement thereof. If a Product or any part thereof becomes, or in CAPE CLEAR's opinion is likely to become, the subject of a valid claim of infringement or the like under any patent, copyright, trade secret or other proprietary right law, CAPE CLEAR shall have the right, at its option and expense, either to obtain for Customer a license permitting the continued use of the Product or such part, to replace or modify it so that it becomes non-infringing, or to refund an amount equal to the depreciated license fee paid by OEM for the Program (calculated on a straight line basis over a five-year life) and to terminate the license therefor. CAPE CLEAR shall have no liability hereunder for any costs incurred or settlement entered into without its prior written consent. CAPE CLEAR shall have no liability hereunder with respect to any claim based upon (f) the operation of an Application or the combination of the Product with other products not furnished by CAPE CLEAR, (g) any addition to or modification to the Product by any person or entity other than CAPE CLEAR, (h) the use of other than a new version of a Product which is made generally available to CAPE CLEAR's customers and provided to Customer, or (i) CAPE CLEAR furnishing to Customer any information, data, service and applications assistance, other than the Product. THE PROVISIONS OF THIS SECTION 9 STATE THE EXCLUSIVE LIABILITY OF CAPE CLEAR AND THE EXCLUSIVE REMEDY OF CUSTOMER WITH RESPECT TO ANY CLAIM OF PATENT, COPYRIGHT, TRADE SECRET

ATTACHMENT B

OR OTHER PROPRIETARY RIGHT INFRINGEMENT BY THE PRODUCT OR CLAIM THAT CAPE CLEAR LACKS THE RIGHT TO GRANT THE LICENSES GRANTED HEREIN, ANY PART THEREOF OR THE USE THEREOF, AND ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTY OF NON-INFRINGEMENT, AND INDEMNITIES WITH RESPECT THERETO.

10. **TECHNICAL SUPPORT AND SERVICES:** The services described in CAPE CLEAR's then-current and applicable Technical Support Service Policy, a copy of which is available at Customer's request ("Technical Support") that Customer orders and pays for will be provided in accordance with CAPE CLEAR's then-current and applicable Technical Support Service Policy at applicable fees. CAPE CLEAR will provide professional services, on strictly a time and materials basis, ordered by Customer, in accordance with CAPE CLEAR's standard professional services terms and conditions which are incorporated herein by reference, at the then-current CAPE CLEAR price list and any relevant CAPE CLEAR work order. Any ideas, know-how, techniques and software which may be developed by CAPE CLEAR in connection with Technical Support and/or professional services, including any enhancements or modifications made to the Products, shall be the sole property of CAPE CLEAR and subject to this Agreement.
11. **U.S. GOVERNMENT RESTRICTED RIGHTS:** If Customer is an agency or contractor of the United States Government, Customer acknowledges and agrees that (i) the Product was developed entirely at private expense, (ii) the Product in all respects is proprietary data belonging solely to Cape Clear Software, Inc. or its licensors, (iii) the Product is not in the public domain, and (iv) the Product is "Commercial Computer Software" as defined in sub-paragraph (a)(1) of DFAR Section 252.227-7014.
12. **GENERAL PROVISIONS:** This Agreement, including any applicable Purchase Documentation, represents the entire agreement between Customer and CAPE CLEAR with respect to the Product and subject matter hereof, and supersedes all prior proposals, representations and agreements, whether written or oral, with respect thereto. It is expressly agreed that any terms and conditions of a purchase order and/or any other document issued by Customer in relation towards the order of the Product and supported licenses, Technical Support and/or professional services shall be superseded by the terms and conditions of this Agreement. This Agreement may be amended or modified only by a written agreement executed by Customer and CAPE CLEAR. Wherever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provisions of this Agreement shall be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Agreement. Neither party shall be liable for any reasonable delays in the performance of any of its obligations, with the exception of payment obligations, hereunder due to war, acts of God, acts of terrorism, or other causes beyond its reasonable control. Neither party may assign this Agreement or any of its rights hereunder without the prior written consent of the other party, except that CAPE CLEAR may assign this Agreement as part of a corporate reorganization or to a successor to that part of CAPE CLEAR's business related to licensing the Product or a purchaser of substantially all the assets of CAPE CLEAR and/or the Product. The failure of CAPE CLEAR at any time or times to require performance of any provision hereof shall in no manner affect the right at a later time to enforce such provision. The parties agree that they are independent contractors and that this Agreement and the relations between CAPE CLEAR and Customer hereby established do not constitute a partnership, joint venture, agency or contract of employment between them, or any other similar relationship. Customer shall comply with all applicable laws, including export controls imposed by the United States Government. Without limiting the generality of the foregoing, Customer agrees that it shall not export or re-export any Product or the direct product thereof to any country without first obtaining all necessary and required licenses, consents and approvals. Customer acknowledges that shipments of the Product are subject to export laws and that such laws could delay or preclude delivery of Product in the future. Customer shall also comply with the United States Foreign Corrupt Practices Act, and shall indemnify CAPE CLEAR from any failure to comply with such Act or export regulations. Customer shall, at its sole cost and expense, obtain and maintain in effect all permits, licenses and other consents necessary to the conduct of its activities hereunder. Customer's covenants and agreements in Section 2 hereof are of a special and unique character, and Customer acknowledge that money damages alone will not reasonably or adequately compensate CAPE CLEAR for any breach of such covenants and agreements. Therefore, Customer and CAPE CLEAR expressly agree that in the event of the breach or threatened breach of any such covenants or agreements, in addition to other rights or remedies which CAPE CLEAR may have, at law, in equity, or otherwise, CAPE CLEAR shall be entitled to injunctive or other equitable relief compelling specific performance of, and other compliance with, the terms of such Section. During the term of this Agreement, and for a period of one year thereafter, Customer agrees not to solicit, induce, attempt to hire or hire any employee of CAPE CLEAR, or assist in such hiring by any other person or business entity or encourage any such employee to terminate his or her employment with CAPE CLEAR, without prior written consent of CAPE CLEAR. For the term of this Agreement and one year thereafter, CAPE CLEAR shall have the right, at its own expense and under reasonable conditions of time and place, to from time to time have an independent auditor audit and copy all records of Customer relating to any of Customer's obligations under this Agreement. In the event any such audit discloses any breach of the terms of this Agreement by Customer or its employees, agents

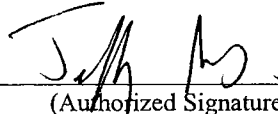
ATTACHMENT B

or contractors, Customer shall, in addition to such other rights and remedies as may be available to CAPE CLEAR as the result of such breach, pay to CAPE CLEAR the full cost of such audit and copying, and all costs and expenses required to collect any underpaid amounts, if any, including, but not limited to, reasonable attorneys' fees, court costs, and expert witnesses, incurred in connection therewith. Any notices required or permitted hereunder shall be given in writing. Either party may publicize the existence and general nature of the relationship established by this Agreement through mutually agreed upon press releases and other marketing collateral. The terms of this Agreement shall be construed in accordance with the substantive laws of The Commonwealth of Massachusetts, USA without regard to its principles of conflict of law or the U.N. Convention on Contracts for the International Sale of Goods. The provisions of Sections 2, 3, 4, 6, 7, 11 and 12 shall survive the expiration or earlier termination of this Agreement for any reason.

THIS AGREEMENT IS EXECUTED ON BEHALF OF EACH PARTY BY ITS DULY AUTHORIZED REPRESENTATIVE AS OF THE EFFECTIVE DATE.

CAPE CLEAR

By:


(Authorized Signature)

Name:

JEFFREY READ
(Print or Type)

Title:

PRESIDENT

CUSTOMER

By:

(Authorized Signature)

Name:

(Print or Type)

Title:

ATTACHMENT C

Cape Clear Software, Inc.

Standard Technical Support Service Policy

Service Description

The terms of this policy are applicable to Cape Clear Software, Inc., including all subsidiaries of Cape Clear Software, Inc. (collectively "Cape Clear").

This policy document describes the service provisions and terms of technical assistance provided by the Technical Support made available by Cape Clear. Upon purchase of maintenance, this subscription service is available to customers that have purchased any Cape Clear software products and is applicable only to the software product for which it is purchased.

Cape Clear provides a one year subscription to the Technical Support upon payment of the required fees. Upon payment of the then-current annual Technical Support fee, Cape Clear will provide the Technical Support service described in this document for Cape Clear software in accordance with the terms and conditions defined herein.

Each term of Technical Support shall be for a period of one year from the date of execution of the relevant Order Form. Technical Support shall continue for additional one-year terms pursuant to Cape Clear's then-current policies, and fees of Technical Support, unless, not less than sixty days prior to the date upon which the then-current term is due to end, either party notifies the other in writing of its intention to terminate Technical Support.

Cape Clear may, where appropriate, prorate Technical Support fees so that Technical Support for all software is renewable on the same date, even if all the software or Technical Support were not ordered at the same time. Should Cape Clear designate such a common renewal date, then renewal and/or termination pursuant to the foregoing shall take place with reference to that date.

Cape Clear reserves the right to refuse all Technical Support and any other services to any customer that is currently past due or in arrears until such time as the account is brought current. Reinstatement of lapsed Technical Support is subject to the fees specified in Cape Clear's price list in effect on the date of reinstatement. In the event that customer has allowed Technical Support to lapse for a period of one year or more, customer must repurchase the licenses for which Technical Support has lapsed, at Cape Clear's then-current list price, in order to reinstate Technical Support.

Technical Support is not available for less than all the Software licenses held by customer.

Technical Support Provisions

- A. Nature of Technical Support. Subject to the following, Cape Clear will use reasonable efforts to assist in locating appropriate solutions to customer inquiries and problems. In order to resolve a problem, Cape Clear may require customer's reasonable assistance in re-creating the problem. Failure by customer to re-create the problem after reasonable efforts, or to provide such assistance as may be necessary, may prevent Cape Clear from resolving the problem. Cape Clear will utilize trained and skilled professionals selected by Cape Clear in its sole discretion who will be able to respond to technical questions, help customers identify problems, and assist customers in finding solutions to those problems.

Notwithstanding the foregoing, customers are responsible for all actions required to verify and substantiate the existence of a Cape Clear software product problem and to ascertain the conditions under which the problem may be duplicated. In order to receive technical assistance, customers must provide Cape Clear technical support with the following information (as a minimum) at the time of initially reporting the problem or question:

- Contact Name
- Company Name
- Email Address

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- Phone Number
- Hardware Platform
- Operating System and Version
- Cape Clear Product Name
- Cape Clear Product Version
- Third Party Products Involved (if applicable) , including without limitation Java Development Kit Version
- Concise question or clear description of problem (must include exact error message if applicable), and steps leading to the error or problem symptoms
- Severity Level

In many cases, in order to solve a reported problem, customers may be asked to provide additional data and information. In addition to the foregoing, in order to verify a product error, customer shall provide a complete description of the product error to enable Cape Clear support engineers to proceed with the problem investigation, including sufficient information to enable Cape Clear technical support to reproduce the problem.

Problems that are encountered by a customer should be reported by customer or its agents to Cape Clear along with a specific Severity Level value encountered by customer. The Severity Level is initially assigned by the customer, but Cape Clear reserves the right to assign a reasonable Severity Level value to all received issues, based on the following definitions:

- Severity Level 1: Cape Clear software has experienced a significant problem that prevents operation or severely limits the performance of the Cape Clear software in a production environment. No workaround appears to be available.
- Severity Level 2: Cape Clear software has experienced a significant problem that prevents operation or significantly affects the performance of the Cape Clear software in a development environment, or prevents operation of or severely limits the performance of the Cape Clear software in a production environment, but a workaround exists.
- Severity Level 3: Cape Clear software has experienced a problem that does not prevent operation or significantly affect performance of the Cape Clear software, but a significant area of functionality of the Cape Clear software does not operate as described in the Cape Clear software documentation.
- Severity Level 4: Cape Clear software has experienced a problem that does not impact the operation or overall performance of the Cape Clear software but has a minor impact on the performance of the Cape Clear software or reflects a minor non-conformance to the Cape Clear software documentation; or customer has general questions about Cape Clear Software that are either not covered in documentation or needs clarification; or customer has a request for an enhancement to Cape Clear software. Any enhancement delivered to a customer shall be regarded as part of the software, which is the subject of this Software Support Service Policy. Cape Clear shall retain all title and interest in any enhancement, including all copyright, patent, trademark and other proprietary rights.

B. Technical Assistance. Technical Assistance is provided via email to clients in accordance with the terms of this policy. "Technical Assistance" consists of Cape Clear's reasonable commercial efforts to provide, at the discretion of Cape Clear, patches, work-arounds, or other resolutions for acknowledged faults in Cape Clear software.

(i) Response Types. Four types of responses will be delivered by Cape Clear to customers as follows:

- I. *Initial:* The initial response will acknowledge the service request.

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Cape Clear Software, Inc.

Standard Technical Support Service Policy

- II. *Follow-up:* A follow-up response will occur at intervals for as long as an issue remains open. A follow-up response will also occur if Cape Clear is unable to reproduce a problem that has been

reported. This type of follow-up will generally request further information from customer to better define the problem.

- III. *Fix:* When and if a temporary fix is ready, Cape Clear will contact customer's technical contact with the fix and any related software or documentation, if necessary.

- IV. *Solution:* When and if a complete solution is ready, Cape Clear will contact the appropriate technical contact with the solution and any related software or documentation, if necessary.

Cape Clear will make reasonable efforts to provide the foregoing response types whenever possible. The failure of the customer to provide requested information at the time of request will have a significant impact on the ability of Cape Clear to respond effectively to customer. In some cases the lack of such information may make it unfeasible to provide a solution to a reported problem.

- (ii) Patches. Cape Clear from time to time makes available "Patch" releases containing error corrections to previously released versions of Cape Clear software products. Cape Clear makes reasonable efforts to provide drop-in compatibility of Patches with the prior release that they replace. The latest Patch generally available for a given release of software on a specific platform immediately replaces the prior release or Patch (if any). For example, Cape Clear ESB version 6.1 Patch 1 immediately replaces the Cape Clear ESB version 6.1 release. No remedial support is provided for any release or Patch replaced by a more currently released Patch for the same version of software on the same platform. All bug reports, test cases and support work will always be based on the latest Patch released for any Cape Clear software product on any supported platform. Should the installation of the latest Patch solve a reported problem, then the recommendation to install that Patch is considered a suitable remedy for the reported problem.

- C. Contacting Cape Clear. If a customer needs to request Technical Support service for the purpose of resolving questions about or reporting problems encountered with Cape Clear software products, the following options are available:

- Email is the standard method of contacting Cape Clear's Technical Support staff. Given the nature of the types of problems and questions typically reported, email makes the resolution process much more timely and efficient. Support requests should be emailed to support@capeclear.com.
- Unlimited telephone support is also provided to subscribers who have purchased Standard Technical Support.

During Cape Clear Technical Support business hours, Cape Clear responds to reported problems experienced on configurations classified as "Supported" in the then-current Cape Clear Configuration Support Matrix. Currently, Cape Clear Technical Support business hours in the US are 9:00AM to 5:00PM EST. (These hours become EDT when daylight saving time is in force in the Commonwealth of Massachusetts.) Cape Clear Technical Support business hours in Europe are 9:00AM to 6:00PM GMT. (These hours become BST when daylight saving time is in force in the United Kingdom.) In all cases, office hours exclude local holidays or unforeseen circumstances (weather, power outage, etc).

As customers report problems or ask questions of Cape Clear Technical Support, each problem is assigned a unique support case number, which is used to track all information and developments relating to the customer's request. When communicating with Cape Clear Technical Support about a previously reported problem or question, customers must supply the unique support request number in the subject line as part of each communication. Failure to identify the support request number in each case may result in a negative impact on the ability of Cape Clear to respond in as timely a manner as possible.

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In the case of Cape Clear software products being shipped or integrated with other third party vendor products, these guidelines assume that the third party vendor's technical support staff have already made a reasonable attempt to verify and resolve the bug report, before contacting Cape Clear Technical Support. If

the vendor's Technical Support staff is unable to resolve the problem, Cape Clear's Technical Support will then work with the vendor's support staff to resolve the problem. Cape Clear will not work directly with the vendor's customers.

- D. Software Updates. Cape Clear, at its sole discretion, makes Updates (as defined below) to its software to correct errors, to make enhancements, or to otherwise improve software performance. Cape Clear provides subscribers in good standing to Technical Support with software Updates to correct newly reported product errors of a critical nature experienced with currently supported product releases and where there is no reasonable workaround, according to the terms and conditions set forth herein. The provision of such Updates is as requested by customers and is subject to technical feasibility in addition to the scheduling of planned new product releases.

For the purposes of this Standard Technical Support Service Policy, an "Update" means a version of the software commercially released by Cape Clear during the term of the provision of Technical Support, that generally consists of incremental functional enhancements and feature additions similar or closely related to the functions or features of the preceding version of the Software, or maintenance fixes and minor enhancements, or a patch or a bug fix consisting generally of error corrections and minor additions, in object code form only, and any related documentation. Provided that a customer has paid the annual maintenance fee for the support period during which an Update is released, customer may obtain that Update at no additional cost or charge, by download.

At customer's request, on-site professional technical assistance, including without limitation Update installation, may be provided, pursuant to Cape Clear's standard professional services terms and conditions, to augment the Technical Support, at an additional charge based on Cape Clear's then-current rates and strictly on a **time and materials basis**. Cape Clear shall use its reasonable commercial efforts to give advance email notice to customers when an Update is going to be commercially released. Updated versions of Cape Clear software are subject to the same software licensing terms and conditions that governed the originally supplied version of the same software product, unless specifically noted otherwise by Cape Clear.

Cape Clear software Updates are made available to Standard Technical Support customers via the Cape Clear web site.

These guidelines also assume that any discovered product error can be reproduced by Cape Clear. If Cape Clear cannot reproduce a reported product error in-house, an Update is not guaranteed according to these guidelines.

Cape Clear, at its sole discretion, also makes occasional enhancements to its user documentation. Standard Technical Support includes updated documentation in on-line form.

- E. Supported Software. Technical Support and assistance is provided for the following classes of commercially released Cape Clear software products when the product is being used on a hardware and software configuration classified as "Supported" on the then-current Cape Clear Configuration Support Matrix:

1. Currently shipping versions of released products

Technical Support will be provided for the currently shipping version of all commercially released Cape Clear software products, provided that the most recent Patch and/or Update has been installed.

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Standard Technical Support Service Policy

Early Adopter and Beta versions of Cape Clear software products may be made available from time to time at the sole discretion of Cape Clear. These Early Adopter and Beta versions of Cape Clear software are not covered under this support policy.

2. Superseded releases

A Cape Clear software product release for a supported platform is classified as superseded when a new major release of that product for the same platform is made generally available to customers. For example, Cape Clear ESB version 6 supersedes Cape Clear ESB version 5. Technical Support will be provided for the two most recently superseded versions of commercially released Cape Clear software products, provided that the most recent Patch and/or Update for that release has been installed.

Standard Technical Support Services does not provide support for commercial releases of Cape Clear software older than the current or two most recently superseded releases. At the discretion of Cape Clear, Technical Support for Cape Clear software releases older than the current or the two most recently superseded release may be available, in Cape Clear's sole discretion, separately at additional cost over that of Standard Technical Support.

3. Products retired within the last 12 months

A product is retired when Cape Clear announces via general public notice or via the product release notes that no further versions past the currently shipping version will be developed for the identified Cape Clear software product on a specific hardware platform. Technical Support will be provided for the last version of Cape Clear software products that have been retired for 12 months from the date the product has been retired if the most recent Patch and/or Update available has been installed. However, problems may be fixed for a retired Cape Clear software product at the sole discretion of Cape Clear.

4. Product functionality retired within the last 12 months

Functionality is retired when Cape Clear announces via a general public notice or via the release notes that specific functional capabilities are being removed from a Cape Clear software product on a specific hardware platform. Technical Support will be provided for functionality retired for up to 12 months from the date the functionality has been retired. However, problems may be fixed for retired functionality at the sole discretion of Cape Clear.

- F. On-site Technical Assistance. At customer's request, on-site consulting technical assistance may be provided to augment Standard Technical Support, at an additional charge based on Cape Clear's then current professional service rates on **strictly a time and material basis** in accordance with Cape Clear's then-current standard professional services terms and conditions. Cape Clear consultants can assist in solving the most complex technical problems and offer consulting advice on multiple approaches to web services systems design, development, and integration. Customer issues or problems involving architecture or design of customer Application Programs ("Application Programs") or performance tuning of customer Application Programs are considered to be outside the scope of work of Standard Technical Support. Such issues are the domain of Cape Clear professional services.
- G. Confidentiality. All communications from Cape Clear technical support to subscribers of Technical Support are classified as the **confidential and proprietary information** of Cape Clear. This includes any files or information obtained by subscribers from the Cape Clear technical support web server. Subscribers are expressly prohibited from sharing, publishing or reproducing such confidential information to any third party person or organization under any circumstance without the express written permission of Cape Clear. The

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violation of this condition may, at Cape Clear's sole discretion, lead to the future withdrawal of the services described herein.

- H. Excluded Services and Software. This Software Support Service Policy does not obligate Cape Clear to provide: (a) project management; (b) personnel management; (c) application design or development; (d) consulting or other services relating to software other than Cape Clear software; (e) re-creation or re-entry of data lost for any reason whatsoever; (f) support or maintenance services relating to any hardware or peripheral

devices; (g) provision of any functional deliverables. Cape Clear has no obligation to provide or deliver bug fixes, improvements to existing software functions, upgrades, revisions, patches, or enhancements which are requested only by a specific customer, developed on a custom basis for a specific customer, or have no general applicability to other Cape Clear customers. Cape Clear shall have no obligation to support software that has been altered, modified, or damaged or is used in any manner other than that specified in the Cape Clear software documentation. The Technical Support offered under this Software Support Service Policy apply only to Cape Clear software and not to Cape Clear products which are no longer supported by Cape Clear according to Cape Clear's current product support policies.

In addition to the foregoing, Cape Clear shall have no obligation to provide Technical Support if a problem is caused by: (a) relocation, movement, improper operation, neglect or misuse of the Cape Clear software, (b) support service subscriber's failure to maintain proper site or environmental conditions, (c) any fault of support service subscriber's agents or employees, (d) any attempts at repairs, maintenance, or modifications to the Cape Clear software performed by other than authorized service personnel of Cape Clear, (e) casualty, act of God, strikes, riot, war, the unauthorized acts of third parties, (f) failure or interruption of any electrical power, telephone or communication line or like cause, (g) service for Cape Clear software for which all required maintenance releases have not been implemented by support service subscriber, or (h) any other cause external to the Cape Clear software except ordinary use.